

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 20, 2006 Session

ANDRE HICKS v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 2002-B-641 Cheryl Blackburn, Judge**

No. M2006-00204-CCA-R3-PC - Filed February 21, 2007

Petitioner, Andre Hicks, appeals the order dismissing his petition for post-conviction relief, arguing that it should have been granted because he received ineffective assistance of counsel at trial. Following our review, we affirm the post-conviction court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JOHN EVERETT WILLIAMS, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Andre Hicks.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts of Petitioner's underlying offense were set out by this court on direct appeal:

On December 6, 2000, Steven Treece was working as the store manager for the Tennessee State University (TSU) bookstore in Nashville. At approximately noon, Larita Lyons, the store's bookkeeper, informed Treece that he needed to go to the bank because the "store needed some cash." It was a "buy-back" period at the school, which meant that the store needed cash to "buy-back" textbooks from students. At approximately two o'clock, Treece left the bookstore to go to the bank with Scott Pearson, the store's general merchandise manager. Treece did not tell anyone, even Pearson, that they would be going to the bank. The two went to the AmSouth Bank on Clarksville Highway and received \$30,000 in cash, which Treece

placed in a backpack. They then returned to the store and parked in the loading dock area.

Treece described the route to the bookstore, "From the parking area, there is a ramp that you walk up. You go through a set of double doors, go down a short hallway, and turn left, and then behind, kind of tucked to the side is our elevator door." According to Treece, no other office or business uses that elevator. When Treece turned the corner to reach the elevator, he "saw a figure that was dressed all in black, and he was leaned up against the elevator doors." The man was wearing a mask over his face, which exposed the "bridge" between his eyes. Treece described the man as "[s]ix-one, brown complected, maybe 180 pounds[.]" The man pulled a gun on Treece and pointed it at his chest. Out of the corner of his eye, Treece saw Pearson, who had not yet rounded the corner, running away. Treece put his hands up and gave the person the backpack filled with cash. The robber initially told Treece to get on his knees, but the elevator door opened, and the robber told him to get on the elevator. Treece complied, and the robber reached into the elevator and pressed the second floor button. As the doors were closing, the person squeezed the trigger twice, although the gun did not fire.

As soon as the elevator door opened on the second floor, Treece saw TSU Officer Frank White and told him that he had just been robbed. White "jumped" on the elevator, and the two went downstairs to look for the robber. According to Treece,

[w]hen we came out, when we hit the parking lot, you can either go to the right and go behind the residence halls or you can go diagonally to come in front of them and end up in the parking lot and so we came diagonally, running toward 33rd Avenue.

Pearson, who was trying to phone the police, saw the two men running across the campus and joined them in their pursuit. As they ran through a parking lot, they observed a man "dressed in the same clothes" as the robber. Treece stated, "He was, he wasn't running full speed, but he was moving really quickly, and he was looking side to side at the point that I first saw him." Treece identified the man, who now had his ski mask "rolled" up, as the [Petitioner]. Treece told Officer White he knew who it was. Treece was familiar with the [Petitioner] because he was Ms. Lyons' boyfriend. Treece explained, the [Petitioner] "sometimes would drop [Lyons] off and pick her up so I would see him twice in the same day, so I saw him several times throughout the course of a couple of years." Pearson testified that he looked at the man and observed that he was dressed "exactly the same" as the person who he saw robbing Treece.

After the [Petitioner] looked back and saw Treece, “he sped completely across the street.” The group then lost sight of the [Petitioner]. As they stood in the street, they saw “Ms. Lyons’ rental car make a U-turn and go back the opposite way.” At that point, Treece told both Officer White and Pearson that the robber was the [Petitioner]. Ultimately, the group went back to the store. After Lyons was informed of the robbery, she stated that she had not spoken with the [Petitioner] since that morning. However, a subsequent review of her cell phone records indicated otherwise.

On April 23, 2001, the [Petitioner] was indicted for aggravated robbery and attempted first degree murder. A superseding indictment was returned on April 15, 2002, which charged the [Petitioner], along with [Lyons], in count 1 with aggravated robbery and, in count 2, the [Petitioner] was charged individually with aggravated assault. After a trial by jury, the [Petitioner] was found guilty as indicted, and the two counts were thereafter merged into a single conviction for aggravated robbery. On December 18, 2002, the [Petitioner] was sentenced to thirty years in the Department of Correction as a range III offender.

State v. Andre Edward Hicks, No. M2003-00818-CCA-R3-CD, 2004 WL 737535, at *1–2 (Tenn. Crim. App. Apr. 2, 2004), *perm. to appeal denied* (Tenn. Oct. 11, 2004).

On June 28, 2005, Petitioner filed a timely *pro se* petition for post-conviction relief setting forth numerous arguments. In a July 1, 2005 preliminary order, the post-conviction court found Petitioner to be indigent, appointed counsel, and determined that an evidentiary hearing was necessary. Petitioner filed an amended petition on November 3, 2005, arguing ineffective assistance of trial counsel and that the trial court violated his right to a trial by jury through its use of statutory enhancement factors in sentencing.

An evidentiary hearing was held on December 19, 2005. Petitioner claimed his trial counsel was ineffective for three reasons: (1) failure to develop “alibi witness, Tasha Hill[,] or call Asia Wade, who could testify that he was not at the TSU campus bookstore at the time of the offense”; (2) failure to question Treece, the victim, on whether he had misappropriated or embezzled any bookstore funds; and (3) failure to adequately cross-examine Pearson on his direct testimony about Petitioner’s physical appearance.

Petitioner’s sister, Asia Wade, testified that on the day of the robbery, Petitioner was at her house in East Nashville until “seven or eight o’clock at night.” When first asked if she ever spoke with Petitioner’s trial counsel about this information, Wade responded, “I think so. I don’t remember.” Later, she claimed that she was “sure” she had told trial counsel this information. Wade confirmed that she was currently serving a sentence for possession of cocaine and that at the time of Petitioner’s trial, she was in jail for criminal impersonation. She also said that she had been subpoenaed to testify at his trial, but “they didn’t need me.”

Trial counsel testified that prior to trial, Wade told her that Petitioner had arrived at her house on the day of the crime at 9:45 a.m. in Lyons' car and that she had borrowed Lyons' car that day, was not home at the time of the offense, and returned the car to TSU because Petitioner was no longer at her house. Counsel confirmed that she had subpoenaed Wade to testify regarding the fact that Petitioner was not in possession of Lyons' car, as Treece indicated, but not as an alibi witness. She acknowledged that Wade was ultimately not called to testify for tactical reasons.

Trial counsel also testified that even though she had received information from Petitioner that Lyons believed Treece may have been "less than aboveboard" with small amounts of money used for advance purchases at the bookstore, that would not have accounted for the stolen thirty thousand dollars. As to why she did not cross-examine Pearson regarding the discrepancy between his description of Petitioner and Petitioner's actual physical appearance, she said that the discrepancy was obvious and that she did not want to ask "that one question too many" and give him the opportunity to explain his answer more clearly.

Petitioner's co-counsel at trial testified that both defendants had given him vague information regarding the possibility of misappropriation of bookstore funds by Treece, but he was unable to find any support for this information. Counsel also testified that he made the decision not to cross-examine Pearson regarding his description of Petitioner's physical appearance because "we didn't think that any juror would look at [the Petitioner] and think he was light skinned. So we were going to give them an opportunity to try to correct that" if we questioned him about it.

On January 11, 2006, the post-conviction court issued an order denying relief and dismissing the petition.

ANALYSIS

Standard of Review

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the post-conviction court "are entitled to substantial deference on appeal unless the evidence preponderates against those findings." *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001); *see also Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review is of purely factual issues, the appellate court should not reweigh or reevaluate the evidence. *See Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. *See Fields*, 40 S.W.3d at 458; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *see also State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065) (other citation omitted). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

On appeal, Petitioner argues that this court should set his conviction aside and order a new trial because he received the ineffective assistance of counsel. Specifically, he argues that his trial "attorneys did not fully interview and investigate [his] witnesses." He claims that an "example of this is that neither attorney remembers if they specifically investigated the claims that the alleged victim of this robbery, [Treece], had been embezzelling [sic] money from the TSU Bookstore." On this point, the post-conviction court ruled that Petitioner "did not demonstrate by clear and convincing evidence that [Treece] did in fact take any money from the bookstore. Petitioner, therefore, has failed to demonstrate that his counsel were ineffective or that he was prejudiced by any alleged deficiency." We agree: without adducing any evidence in support of his vague assertion that Treece had misappropriated bookstore funds prior to the robbery, Petitioner did not show by clear and convincing evidence that he was prejudiced by a failure of his trial attorneys to bring the matter to light.

Further, Petitioner claims that trial counsel "did not adequately meet with, investigate, or use alibi testimony from Asia Wade." However, the post-conviction court found Wade unpersuasive, stating:

Given Ms. Wade's conflicting testimony and her criminal history, the [c]ourt does not find her testimony to be credible. Ms. Wade's testimony that her brother was in her presence from the night of December 5th to the night of December 6th, 2002 does not correspond to the testimony presented at trial. Accordingly, Petitioner has failed to demonstrate by clear and convincing evidence that his trial counsel was ineffective for failing to call his sister as an alibi witness nor has he established he was prejudiced by any alleged deficiency.

"[T]he post-conviction court's credibility determinations are conclusive on appeal unless the evidence preponderates against them." *Granderson v. State*, 197 S.W.3d 782, 792 (Tenn. Crim. App. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)); *see also Fields*, 40 S.W.3d at 456 (stating that unless the evidence preponderates against them, the post-conviction court's factual findings are entitled to substantial deference on appeal). As the evidence does not preponderate against the post-conviction court's determination that Wade's testimony was not credible, we conclude that any failure to meet with, investigate, or use her as an alibi witness fails to meet either prong of the *Strickland* standard.

Regarding cross-examination of Pearson on Petitioner's physical appearance, the court ruled that the testimony showed trial counsel had "made a tactical decision not to further inquire about the suspect's description, believing it may open the door for Mr. Pearson to explain away his initial response and lessen the positive impact his previous testimony had on Petitioner's case." As such, the court also found this claim to be without merit. We agree with the post-conviction court and further note that Petitioner has not made any showing as to how further cross-examination of Pearson on this point would have changed the outcome of his trial.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's order of dismissal.

THOMAS T. WOODALL, JUDGE